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No. 99-1633

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

U.S. BORAX INC.,

Petitioner,

—v.—

NANCY FORSTER, as Personal Representative of the Estate of CHARLES F. READE, SR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

RESPONDENT'S BRIEF

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Given the probate court's finding of fact, after an evidentiary trial, that Petitioner "was not a reasonably ascertainable creditor nor known to the Personal Representative" (App. 7, 15), did the court below properly hold that Petitioner was not entitled to actual notice of the decedent's death and actual notice of the published "notice to creditors" in the Florida proceeding to distribute his Estate?

2. Does the three-year statute of limitations for contribution claims under CERCLA pre-empt state nonclaim statutes governing the administration of decedents' estates?

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The respondent, Nancy Forster, as Personal Representative of the Estate of Charles F. Reade, Sr. (hereinafter referred to as "the Estate"), respectfully requests that the Court grant the petition for writ of certiorari as to the second question presented therein and affirm the judgment of the Fourth District Court of Appeal of the State of Florida in this case on that issue, and that the Court otherwise deny the petition seeking review of the judgment below.

STATEMENT OF THE CASE

A. Introduction

Nancy Forster, the Estate's representative, finds herself caught between conflicting pre-emption decisions of a state court (the court below) and a federal court (the district court in the Missouri federal proceedings). Petitioner was sued in the Missouri proceedings in 1993 and commenced certain third-party claims later that same year. Petitioner, however, chose not to bring its third-party claims against Charles F. Reade, Sr. in 1993 or any time before his death in 1995. Instead, Petitioner waited until 1997 to assert its claim against the Estate. That claim is based upon Mr. Reade's alleged activities as an employee and minority shareholder of a company that operated the facility until 1963 and owned it, as Petitioner's lessor, until 1968.

Ms. Forster, by contrast, has acted diligently. After her father's death, she did everything she needed to do to administer his Estate, and the Florida courts have found that Petitioner's claim against the Estate is barred. Nonetheless, she cannot close her father's Estate and conclude the distribution of property to his heirs, but must litigate in the Missouri federal proceedings the same claim that the Florida courts held barred. Five years after Mr. Reade's death, the administration of his Estate remains suspended between the contrary rulings of a state and federal court with no end to the federal proceedings in sight. The problem facing Ms. Forster due to this conflict is very much the same problem that decedents' estates and dissolved corporations face nationwide unless the issue presented as Petitioner's second reason for grant of certiorari is authoritatively resolved.

B. Proceedings Below

The Estate incorporates by reference the statement of the case set forth in the decision below (App. 4-7) and, with the following exceptions, the statement of the case set forth in

the Petition. The Estate's disagreement with Petitioner's statement of the case addresses matters relating to the first question presented. The Estate does not dispute any facts set forth in the Petitioner's statement of the case that bear upon whether the second question presented should be reviewed.

The Florida courts did not rule in this case, as Petitioner states, that "a decedent's estate may dispense with providing actual notice of estate administration to contingent, but reasonably ascertainable creditors." (Pet. 2). The probate court held an evidentiary hearing on October 20, 1997 on the respective petitions of Petitioner and the Estate. After that hearing, the court specifically found that Petitioner was not a reasonably ascertainable creditor:

> The court finds Borax was not a reasonably ascertainable creditor nor known to the Personal Representative.

(App. 15). The Fourth District Court of Appeal noted this finding of fact in its opinion affirming that Petitioner was not entitled to actual notice. (App. 7).

The Petition also states that in 1983, the Estate's decedent, Charles F. Reade, Sr., owned all of Reade Manufacturing's common stock. (App. 3-4). That was true in 1983, but not at any time relevant to Petitioner's contribution claim. At the time that Reade Manufacturing owned or operated the site, Mr. Reade was only a minority shareholder in the company.

REASONS WHY THE PETITION SHOULD BE DENIED IN PART AND GRANTED IN PART

A. The Writ Should Be Denied as to the First Question, Which Disputes the Probate Court's Findings of Fact Compelling the Conclusion that Due Process Did Not Require Actual Notice to Petitioner.

As stated in the Petition, the premise of the first question presented is that Petitioner was "a contingent, but reasonably ascertainable" creditor. (Pet. i, 12). Actual notice of estate administration must be given to "reasonably ascertainable" creditors, but not if their claims are "conjectural." *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988). By describing itself as a reasonably ascertainable creditor, Petitioner seeks to cast the issue here as being whether the courts below correctly treated its "contingent" claim as a "conjectural" claim exempted from actual notice requirements under *Pope* and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).

The factual premise of Petitioner's argument is contrary to the fact findings made below. After an evidentiary hearing, the Florida probate court specifically found as a fact that Petitioner "was not a reasonably ascertainable creditor nor known to the Personal Representative." (App. 15). Therefore, whether Petitioner's interests in the Estate were "contingent" or "conjectural" is academic. Due process does not require actual notice to a creditor that is not known to or reasonably ascertainable by the estate's administrator:

> Those beneficiaries . . . whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them, the statutory notice is sufficient.
>
> Nor do we consider it unreasonable for the state to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or,

> although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustees.

Mullane, 330 U.S. at 317. "For creditors who are not 'reasonably ascertainable,' publication notice can suffice." *Pope*, 485 U.S. at 490.

Thus, the first question challenges the correctness of the fact findings made below. Such a factual dispute does not merit this Court's review. Both for this reason and because Petitioner clearly stands outside any constitutional due process requirements of actual notice, the writ should be denied as to the due process question presented by the Petition.

B. The Writ Should be Granted as to the Pre-Emption Question Because It Involves a Legal Issue of General Public Importance on Which a Conflict of Authority Creates Widespread Uncertainty.

As pointed out in the Petition, the decision below and the decision of the United States Court of Appeals for the Third Circuit that it follows, *Witco Corp. v. Beekhuis*, 38 F.3d 682 (3d Cir. 1994), are in direct conflict with the decisions of several federal district courts. (Pet. 16-17). These courts include the district court in the Missouri federal proceedings, which denied the Estate's motion to dismiss Petitioner's third-party contribution claim by holding that CERCLA pre-empted Florida's nonclaim statute, despite the prior contrary ruling by the Florida probate court.[1] (App. 26, 30-37).

The Estate recognizes that conflicts with federal district courts generally do not support the grant of certiorari. In this case, however, resolving the question presented has broad and immediate public importance. Any benefit from allow-

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[1] The Missouri district court also imposed a trust upon the Estate's assets even though the assets were already subject to the Florida court's jurisdiction. (App. 33).

ing this pre-emption issue to percolate further through the federal and state courts would be outweighed by the consequences of allowing the present uncertainty to continue.

The specter of the pre-emption of state probate nonclaim statutes by CERCLA threatens to unsettle the administration of estates for years to come. This unsettling effect also extends to corporate dissolution proceedings, where nonclaim statutes similarly limit the time for claims to be made. *E.g.*, *Burlington Northern & Sante Fe R. Co. v. Consolidated Fibers, Inc.*, 7 F. Supp.2d 822, 826-28 & nn. 1 & 2 (N.D. Tex. 1998) (citing, and summarizing the conflict among, cases addressing whether CERCLA pre-empts state corporate capacity statutes). Both in the context of estate administration and corporate dissolutions, there is a significant public interest in permitting affairs to be wound up and assets distributed in an efficient and timely manner. This need for repose underlies the typically short periods for claims established under state nonclaim statutes in these areas.

Absent a ruling by this Court, there can virtually never be such repose. As noted in the Petition, CERCLA contribution claims may not be asserted "for many years or (as here) even decades." (Pet. 10).[2] An estate's administrator often would have no way of knowing whether such a claim might be asserted in the future. Unless an estate's administrator and beneficiaries can confidently rely upon the periods established by state law for purposes of estate administration, including the statute delineating the time for asserting claims against the estate, it becomes difficult if not impossible for the administration of an estate to be closed for certain in any timely fashion.

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[2] In this case, Petitioner's CERCLA claim against the Estate was asserted almost 35 years after the last possible date of operational involvement at the site by Reade Manufacturing and, therefore, the decedent.

Further, only this Court can provide repose. A decision by any other federal court or by a state court cannot fully resolve the issue even for an estate or the dissolution of a corporation with the jurisdiction of that court. Here, the Florida courts have held that Florida's nonclaim statute is not pre-empted by CERCLA, yet the administration of estates in Florida is rendered uncertain by the possibility of CERCLA contribution claims being asserted, at virtually any time in the future, in other jurisdictions where courts have or might hold that probate nonclaim statutes are pre-empted by CERCLA. Similarly, the Third Circuit's ruling in *Witco* provides little repose to an estate in a jurisdiction within that circuit because a CERCLA claim for contribution could be brought against it within another federal circuit. This cross-jurisdictional effect amplifies the tensions to which estate administrators are subject because of the conflict of authorities on this pre-emption issue. As the Petition points out, the conflict also has cross-jurisdictional impact on CERCLA claimants: the Florida court's ruling affects CERCLA claimants outside of Florida if they have or might have claims against potentially responsible estates probated in Florida. (Pet. 11 n.6).

This case provides an example of this cross-jurisdictional impact. Despite the ruling below, the administration of the Estate remains impeded by the contrary holding in the Missouri federal proceedings. (Pet. 6-7, n.3). The Estate is required to litigate the third-party claims against it in that case and while doing so is drastically limited by the Missouri district court to what it can disburse (App. 33 and n. 1, supra)—keeping the final administration of the Estate in indefinite limbo and imposing legal costs depleting the Estate's distributable (and taxable) assets. Further, after the Missouri proceedings finally reach the United States Court of Appeals for the Eighth Circuit, either the Estate or the Petitioner almost certainly will be returning to this Court with the same pre-emption question that is presented in the current

Petition. There will be, however, no further development of facts relevant to the determination of this legal issue of preemption.

The Court should grant certiorari to provide certainty in areas of state, as well as federal, concern. While the Petition describes the federal policies underlying CERCLA, it is equally clear that "family, property, and probate [are] all areas of traditional, and important state concern." *Boggs v. Boggs*, 520 U.S. 833, 861 (1997) (Breyer, J., dissenting).

This Court recently addressed the interplay between CERCLA and another traditional area of state concern—corporate law—in *United States v. Bestfoods*, 524 U.S. 51 (1998). In that case, the Court considered whether CERCLA was intended to permit holding a parent corporation liable based on its control of a subsidiary that owned or operated a polluting facility without reference to the "general principle of corporate law" that a parent corporation is not liable for the acts of its subsidiary corporations except under the common law doctrine of piercing the corporate veil. *Id.* at 61-63. The Court held that CERCLA was not intended to displace such traditional principles:

> Although this respect for corporate distinctions when the subsidiary is a polluter has been severely criticized in the literature, . . . nothing in CERCLA purports to reject this bedrock principle, and against this venerable common law backdrop, the congressional silence is audible.
>
> * * * *
>
> CERCLA is thus like many another congressional enactment in giving no indication "that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute," . . . and the failure of the statute to speak to a matter as fundamental as the liability impli-

> cations of corporate ownership demands application of the rule that "[i]n order to abrogate a common law principle, the statute must speak directly to the question addressed by the common law." The Court of Appeals was accordingly correct in holding that when (but only when) the corporate veil may be pierced, may a parent corporation be charged with derivative CERCLA liability for its subsidiary's actions.

Id. at 62-63 (citations omitted).[3]

Congress should not be deemed to have intended CERCLA to displace state probate law limiting the time to assert claims against the estates of decedents any more than it intended to displace the rules of state corporation law on piercing the corporate veil. It is well settled that there are three possible bases for federal preemption: express preemption, field preemption, and actual conflict preemption, where "state law is preempted to the extent it actually conflicts with federal law." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion), *id.* at 109-10 (Kennedy, J., concurring), and *id.* at 115 (Souter, J., dissenting). In this case, Petitioner urges, and the federal decisions conflicting with the decision below and with *Witco* have found, actual conflict preemption.

For actual conflict preemption to exist, the conflict must be palpable and significant:

> Such a conflict occurs either because "compliance with both federal and state regulations is a physical impos-

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[3] The Court did not decide whether state or federal common law of corporate veil piercing should apply (the court below had applied state law), because it was not necessary to do so in the case before it. *Id.* at 63 n.9. Further, the Court recognized the possibility that the distinction between federal and state common law in this area might have "little practical significance," since the former draws upon the latter. *Id.*, quoting *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F.Supp. 22, 33 (D.Mass. 1987).

> sibility," or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

California Federal S. & L. Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987). The threshold for such a conflict is high. As Justice Kennedy has explained,

> Our decisions establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act. Any conflict must be "irreconcilable . . . . The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); *see also English [v. General Electric Co.*, 496 U.S. 72, 90 (1990)] ("the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists' " "(quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development and Comm'n.*, 461 U.S. 190, 222-23 (1983). In my view, this type of pre-emption should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress's primary objectives, as conveyed with clarity in the federal legislation.

Gade, 505 U.S. at 110 (Kennedy, J., concurring).

Consistent with this Court's reasoning in *Bestfoods*, the analyses of the Court of Appeals in *Witco* and the Florida court in the decision below demonstrate that there is no such actual conflict between CERCLA's statute of limitations and state nonclaim statutes. The contrary decisions of other courts, however, make clear that this issue will recur and will not be resolved in either this or other cases until addressed by this Court. The Estate, therefore, respectfully submits that the Court should grant the writ as to the pre-

emption issue and affirm the decision of the Fourth District Court of Appeal of Florida in this case.

CONCLUSION

For the foregoing reasons, the Court should deny certiorari on the first question presented, grant a writ of certiorari on the second question presented, and affirm the judgment of the Fourth District Court of Appeal of the State of Florida in this case.

Respectfully submitted,

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